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No. 87-2025

IN THE

Supreme Court of the United States

October Term, 1987

ROBERT PEREZ,
Petitioner,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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I.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should this Court review a decision of the Ohio Supreme Court when the only question presented by Petitioner is whether the Ohio Supreme Court misinterpreted the Ohio Constitution and the Ohio Rules of Civil Procedure?

II.

STATEMENT OF CORPORATE AFFILIATION

Scripps-Howard Broadcasting Company is a partially owned subsidiary of Scripps Howard, Inc., which is a wholly owned subsidiary of The E.W. Scripps Company. Affiliated companies of Scripps-Howard Broadcasting Company or its parent companies are: John P. Scripps Newspapers; Birmingham Post Company; CH Corporation; Cincinnati Post & Kentucky Post; Collier County Publishing Company; The Courier Company; The Denver Publishing Company; Evansville Courier Company, Inc.; Force V Corporation; Herald-Post Publishing Company; Knoxville News-Sentinel Company; Memphis Publishing Company; New Mexico State Tribune Company; Albuquerque Publishing Company; Pittsburgh Press Company; The San Juan Star Company; Stuart News Company; Sun-Tattler Company; United Media Enterprises, Inc.; United Feature Syndicate, Inc.; Newspaper Enterprise Association, Inc.; United Media Ventures, Inc.; TV Data, Inc.; Radix, Inc.; Dataway, Inc.; George R. Hall, Inc.; Hall Systems, Inc.; L-R Cable, Inc.; EWS Cable, Inc.; The Scripps Howard Foundation.

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Respondents Scripps-Howard Broadcasting Company and William Younkin respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Supreme Court of Ohio in this case. That opinion is reported at 35 Ohio St. 3d 215 (1988).

JURISDICTIONAL STATEMENT

Respondents submit that this Court's jurisdiction is improperly invoked under 28 U.S.C. §1257(3) because Petitioner has raised no title, right, privilege or immunity set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULE INVOLVED

OHIO SUPREME COURT RULES

Rule 1. Supreme Court Opinions

(A) All opinions of the Supreme Court shall be reported in the Ohio Official Reports.

(B) The syllabus of a Supreme Court Opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

(C) In a per curiam opinion of the Supreme Court, the point or points of law decided in the case are contained within the text of each per curiam opinion and are those necessarily arising from the facts of the specific case before the Court for adjudication.

STATEMENT OF THE CASE

A. Summary of Procedural History.

Petitioner filed this case in the Court of Common Pleas of Stark County, Ohio on October 31, 1980, claiming that he had been defamed by several broadcasts by Respondents. Because of the highly politicized nature of the case, each of the Stark County Common Pleas judges recused himself, and the matter was assigned to a visiting judge from outside the county. Following appropriate discovery, Respondents sought and the trial court granted summary judgment. Petitioner's opposition to Respondents' Motion for Summary Judgment addressed only one of the several broadcasts he had previously objected to, namely the broadcast that featured certain charges made by one Edward Ferren. Although the Petition for Writ of Certiorari refers to at least seven broadcasts, Petitioner has never pursued any claim regarding any of the other broadcasts during this litigation.

The decision of the trial judge granting Respondents' Motion for Summary Judgment (Petitioner's Appendix at A37-A40) was clear and straightforward and accurately stated Ohio defamation law. However, the three-judge panel of the local Court of Appeals for Stark County reversed the trial court's decision in an opinion that was replete with the court's own speculation about matters not contained in the Record. The appellate court's opinion also reflects a garbled and inaccurate concept of the law of actual malice, which focuses on such irrelevant and speculative issues as "possible" editing of the videotape;[1] rehearsing of statements before

[1] The claim in the Petition that there was "an unusual amount of cutting and piecing of the story" (Petition at 17) is emphatically not true. There is no Record reference to that claim because there is nothing in the Record to support it.

videotaping; the presence of other people during the taping; what the interests of those other persons might be; and what political allegiance Respondent Younkin might have. The opinion of the Court of Appeals never focuses on the attitude of Respondents toward the truth of the broadcast.

The Ohio Supreme Court in a clear and well-reasoned opinion reinstated the trial court's judgment and soundly rejected each of the confused theories of actual malice that appeared in the decision of the Court of Appeals.

Petitioner, having enlisted the assistance of new counsel, has now petitioned for review in this Court of an issue never raised by him in any of the courts below.

B. Statement of Facts.

The broadcast at issue in this case was one of a series of reports about questionable activities in Stark County government. The lawsuit was filed only days before the 1980 Stark County Sheriff's election, and about two weeks after the filing of a similar lawsuit by another Stark County Sheriff's Department official.

Reporter William Younkin, who prepared the broadcasts, had been investigating activities in Stark County for several months before this report aired (R. 243). Younkin was introduced to his principal source for this report, Edward Ferren, through a Stark County Deputy Sheriff who had been a reliable source of information for him in previous reports (R. 248). When they met, Ferren told Younkin that Petitioner Robert Perez, a captain in the Sheriff's Department, had proposed that he sell drugs, not as an undercover agent, but simply as a salesman for Perez (R. 275-277). Ferren told Younkin this twice on videotape. The transcript of

the videotaped interview is crystal clear that Ferren understood that he had been solicited to sell drugs illegally on behalf of Perez.[2]

Younkin tested Ferren's motivation by asking why he was willing to talk to him about this. Ferren said that it was not right that the police could do this sort of thing, while ordinary people who did would be in jail. Although Ferren feared for his personal safety, he said that he had decided to talk to Respondents because he felt they had demonstrated a willingness to tackle the "power structure" in Stark County (R. 250).

Respondents spent two weeks following the Ferren interview investigating his charges. Specifically, Respondents confirmed numerous circumstantial details of Ferren's story, including his claimed employment, the details of his minor criminal record, the fact he actually had been in jail at the time the solicitation by Perez occurred, and that he had been taken from his cell to Perez's office for a meeting during that confinement (R. 250-51).

Younkin repeatedly tried to reach Petitioner both at home and at work to get his response to the charges. Although Younkin left explicit messages as to why he was calling Perez, those calls were never returned (R. 251).

Younkin also spoke with other members of the law enforcement community in an effort to obtain further information about the charges; none of those he spoke with told him that the charges were untrue or unbelievable. He did learn from these law enforcement sources of several instances in which Perez had been

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[2] The complete text of the interview with Ferren which was broadcast by Respondents is included in Petitioner's Appendix at A2-A4.

given specific information about drug dealers, but had taken no action against them (R. 251-52). The same sources told Younkin that the Sheriff's Department had allowed Charlie Smith, a "con man" with a long criminal record who was friendly with several department members, including Perez, to take and resell illegal drugs that had been confiscated in department raids (*Id.*).

So-called "street people" and law enforcement personnel both told Respondents that drugs seized in raids by the Stark County Metropolitan Narcotics Unit, of which Petitioner was a ranking officer, were not being destroyed and were being resold on the street. Respondents investigated Stark County files and found no records of the destruction of seized drugs, although such records are routinely kept in other Ohio counties (R. 252-53).

There is no dispute that Respondents conducted this extended investigation before publishing. Moreover, Younkin's *unchallenged* testimony was that he believed the truth of the statements made to him by Ferren regarding Perez's solicitation to sell drugs illegally and that he believed that the broadcasts were true (R. 253, 259).

The broadcast at issue primarily consisted of charges made by Ferren himself on videotape. Twice thereafter Ferren reiterated that those charges were true. The first time was after a Sheriff's Department board of inquiry "cleared" Petitioner of any wrongdoing, when Ferren specifically stated on tape in another interview: "I stand by what I said." (R. 258). The second reiteration occurred in Ferren's deposition when he was asked and answered as follows:

Q. When you were being taped [by Mr. Younkin] did you tell him the truth to the best of your understanding at that time?

A. Yes.

(R. 319).

Neither the affidavit of Petitioner nor his deposition contradicts Ferren's testimony with regard to his conversation with Petitioner that was reported by Respondents.

No evidence contradicts Younkin's testimony that he found Ferren credible and believed him. In fact, during the five years that this case was pending in the trial court, Petitioner never took the deposition of any of the Respondents, nor made any effort to establish what Respondents had done in preparing the broadcasts. Petitioner introduced no evidence pertaining to Respondents' state of mind as to the truth of the broadcasts. The only evidence in the record as to Respondents' attitude toward the truth of the broadcasts is the detailed affidavit of William Younkin, which asserted unequivocally that he believed what was published was the truth (Petitioner's Appendix at A53).

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO RAISE OR PRESERVE THE PURPORTED CONSTITUTIONAL ISSUE REGARDING THE RIGHT TO A JURY TRIAL AND OPEN ACCESS TO THE COURTS WHICH HE HAS ASKED THIS COURT TO REVIEW.

Petitioner purports to raise a "constitutional" issue concerning denial of his rights under the Ohio Constitution to a jury trial and open access to the courts. This is the very first time that Petitioner has ever mentioned this issue. Because of this, he has failed to preserve the issue for review by this Court.

It has long been the rule of the Ohio Supreme Court that the syllabus of its decision contains the law of the case. *State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 107-108 (1913). *See Beck v. Ohio*, 379 U.S. 89, 93, n.2 (1964).[3] Thus, the only matters decided by the Ohio Supreme Court are found in its syllabus. The syllabus of the Ohio Supreme Court in this case (at A1-A2 of Petitioner's Appendix) makes no mention of the purported constitutional issue Petitioner has attempted to raise in his Petition. Therefore, under Ohio law the Ohio Supreme Court did not pass on the issue in this case.[4]

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[3] This principle of law is also set forth in Rule 1(B) of the Ohio Supreme Court Rules for the reporting of opinions which states:

> The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

[4] In fact, the Ohio Supreme Court's opinion reviewed *in toto* reflects no mention whatsoever of the issue Petitioner seeks to raise here. There is no mention of Article I, Section 16 of the Ohio Constitution. There is no discussion of the right to a jury trial. There is no mention of *Anderson v. Liberty Lobby, Inc.* affecting the meaning of Rule 56 of the Ohio Rules of Civil Procedure.

This Court has consistently held that where the highest state court has failed to pass upon the question presented for review, it will be assumed that the omission was due to want of proper presentation of that issue in the state courts. *See, e.g., Exxon Corp. v. Eagerton,* 462 U.S. 176, 181, n.3 (1983); *Street v. New York,* 394 U.S. 576, 582 (1969). This rule is based upon sound policy, specifically the need to ensure a sound and accurate record, and the requirement that the state's highest court first actually decide issues presented to this Court for review. The rule requires that the petitioner demonstrate that the issue he seeks to raise in this Court was presented to and decided by the court below. *See Hill v. California,* 401 U.S. 797 (1971). Petitioner herein has not and cannot make such a demonstration.[5]

Since Petitioner has failed to raise, present or preserve the very issue he now seeks to have this Court review, the Court should deny his petition.

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[5] The Petition is devoid of any indication or record reference to when the question sought to be reviewed was first raised, how it was raised, etc. so as to demonstrate that this Court has jurisdiction, as required by Supreme Court Rule 21(h).

II. PETITIONER HAS FAILED TO ESTABLISH JURISDICTION IN THIS COURT OR ANY BASIS FOR DISCRETIONARY REVIEW BY THIS COURT.

Petitioner has failed to establish jurisdiction in this Court under 28 U.S.C. §1257(3); nor has he qualified for review under any of the criteria set forth in this Court's Rules for granting discretionary review when jurisdiction exists.

Under 28 U.S.C. §1257(3), a decision of the highest court of a state may be reviewed by this Court by writ of certiorari where:

> . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioner has asserted only that his right to a jury trial and free access to the courts guaranteed by provisions of the Ohio Constitution have been impaired. Petitioner has not raised any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States. The interpretation of Petitioner's rights under the Ohio Constitution is a question to be decided by the Ohio courts, whose decisions on such matters this Court is bound to accept. *International Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S. 380, 387 (1986) (this Court has "no authority to review state determinations of purely state law"); *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 488 (1976). By his own definition of the question presented for review, Petitioner has established that this Court has no jurisdiction to review this case.

Nor has Petitioner set forth any basis for this Court to exercise its discretion to review this case, assuming *arguendo* that it had jurisdiction to do so. Supreme Court Rule 17 specifies those circumstances under which the Court will grant discretionary review. Rule 17.1(a) deals with the review of federal appellate decisions, and is plainly inapplicable to this case. Rule 17.1(b) deals with the review of decisions of state courts of last resort which conflict with decisions of other state courts of last resort or federal appellate courts. Petitioner has not argued that any such conflict is presented by this case.

Rule 17.1(c), in relevant part, allows the review of state court interpretations of important questions of federal law which have not been, but should be, settled by this Court, or state court decisions regarding federal questions which conflict with this Court's decisions. Petitioner has not argued that the decision below involves any undecided federal issue, or that the Ohio Supreme Court decided any federal issue in conflict with the decisions of this Court. Accordingly, Petitioner has failed to establish any basis for review by this Court and the petition should be denied.

III. THE DECISION OF THE OHIO SUPREME COURT REQUIRES NO REVIEW BECAUSE IT PLAINLY REFLECTS THAT THE COURT CORRECTLY APPLIED WELL-ESTABLISHED PRINCIPLES OF OHIO AND CONSTITUTIONAL LAW TO THE SPECIFIC FACTS OF THIS CASE.

The decision of the Ohio Supreme Court in this case requires no review, since it merely reflects the proper application of several well-settled principles of Ohio and constitutional law to the facts presented. The court properly conducted an independent review of the entire record to determine whether the record as a whole established actual malice with convincing clarity. *Bose Corp. v. Consumers Union*, 466 U.S. 485, *reh'g denied*, 467 U.S. 1267 (1984). In conducting its review, the court relied on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), for the proposition that a public official plaintiff's burden in a defamation action is to prove actual malice with clear and convincing evidence. Well-established Ohio law is in accord, and holds that a public official libel plaintiff must produce evidence sufficient to raise a genuine issue of material fact from which a reasonable jury could find actual malice by clear and convincing evidence to avoid a properly supported motion for summary judgment. *Bukky v. Painesville Telegraph & Lake Geauga Printing Co.*, 68 Ohio St. 2d 45, 428 N.E.2d 405 (1981). *Accord Scott v. News Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986); *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980), *cert. denied*, 452 U.S. 962 (1981).

The Ohio Supreme Court also correctly invoked the well-settled principle that the actual malice test focuses on the defendant's attitude toward the truth of the publication at issue. *E.g., Herbert v. Lando*, 441 U.S.

153, 160 (1979); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Unless the plaintiff can demonstrate that a publication was made with a high degree of awareness of probable falsity, or that the defendant entertained serious doubts about the truth of the publication, there is no proof of actual malice. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant*, 390 U.S. at 731.

Finally, the Ohio Supreme Court accurately observed that only factual disputes that might affect the outcome of the suit will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).[6]

The decision below resulted from the proper application of the above well-settled principles of law to the Ohio Supreme Court's independent review of the entire record. Because Petitioner failed to present any clear and convincing evidence that Respondents believed they were not publishing the truth, or that they had acted in reckless disregard of the truth, the Ohio Supreme Court reinstated the trial court's entry of summary judgment.

The Ohio Supreme Court's decision recounts at length the efforts of Respondents to corroborate their information, and recognizes the obvious fact that such efforts are powerful evidence of the absence of actual malice—they reflect instead a commitment to finding the

[6] Petitioner's argument that *Anderson v. Liberty Lobby, Inc.* has somehow undercut his Ohio constitutional rights is mystifying, given the Ohio Supreme Court's reliance on *Liberty Lobby* solely for this point, which is hardly a novel one. Both Ohio and Federal Rule 56 have always provided that summary judgment should be granted if there is no "genuine issue as to any *material* fact." (Emphasis added.) *Liberty Lobby* makes explicit what was always implicit in the rule: a dispute of fact, the resolution of which cannot affect the outcome of the case, is not "material" and does not preclude the entry of summary judgment.

truth. The decision also specifically addresses each of Petitioner's arguments that he claims establishes actual malice, and explains why Petitioner is mistaken.

A review of the decision discloses that Petitioner tried to prove actual malice by relying on ambiguous facts or the alleged attitude of the Respondents toward people rather than toward the truth. As the Ohio Supreme Court recognized, that is not proof of actual malice. *See Time, Inc. v. Pape*, 401 U.S. 279, 290, *reh'g denied*, 401 U.S. 1015 (1971); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967).

Petitioner's other "proof" of actual malice is his theory that heretofore unposed and unanswered questions about what might have motivated Respondents to make the broadcast requires an examination into Respondents' thought processes and attitudes toward the truth of the broadcast. Petitioner had five years and all the tools of discovery available to him to make that inquiry. For whatever reason, he did not. Now he complains to this Court that the allegations of his Complaint "cannot be outweighed" by the specific statements contained in the detailed affidavit of Respondent Younkin which Petitioner dismisses as "self-serving." Simply reading Ohio Civil Rule 56(E) (Petitioner's Appendix at A44-45) demonstrates that Petitioner's argument is baseless.[7]

[7] It is ironic that Petitioner is complaining about the Ohio Supreme Court's interpretation of Rule 56 of the Ohio Rules of Civil Procedure when his own affidavit filed herein reflects a fundamental misconception of what Rule 56 requires. That affidavit is replete with inadmissible and irrelevant statements, including the statement that Petitioner "will produce evidence" that his reputation was damaged; that "other [unspecified] acts of the defendant" were equally "demeaning" to him; that the broadcast of the interview with Ferren "impl[ied]" it was spontaneous; and that the deposition of Edward Ferren proves not only "reckless disregard" but also "actual malice." (R. 290). Obviously, these are not "facts" that are "admissible in evidence" so as to preclude summary judgment. Ohio Civil Rule 56(E).

The Ohio Supreme Court properly sorted through Petitioner's jumble of misconceptions and irrelevancies and got to the heart of the matter. It announced no new rule of law, nor did it rely on *Anderson v. Liberty Lobby, Inc.*, for anything more than the incontrovertible proposition that only a dispute as to a *material* fact precludes the entry of summary judgment which is otherwise appropriate. Somehow, Petitioner has transmogrified that reference into a denial of his Ohio constitutional rights. His argument is utterly unsupportable.

Petitioner has presented no important legal issue to this Court for review. He simply wants to have this Court review the facts and reach a different conclusion than the Ohio Supreme Court reached. This Court does not grant certiorari merely to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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